

This Opinion is Not a  
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Hungry Pet Nutrition LLC*

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Serial No. 88625423

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Molly B. Markley of Young Basile Hanlon & MacFarlane, P.C.,  
for Hungry Pet Nutrition LLC.

Miroslav Novakovic, Trademark Examining Attorney, Law Office 108,  
Kathryn Coward, Managing Attorney.

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Before Cataldo, Lynch, and Lebow,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

**I. Background and Evidentiary Matter**

Hungry Pet Nutrition LLC (“Applicant”) seeks registration on the Principal Register of the mark SUPERFOOD FOR SUPERDOGS in standard characters, with a disclaimer of SUPERFOOD FOR DOGS, for “dog food, namely, dry kibbles for dogs only; none of the above including dog snacks, dog treats, pet snacks or pet treats” in

International Class 31.<sup>1</sup> The Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the previously registered mark on the Principal Register, SUPERFOOD SNACKS FOR DOGS in standard characters, with a disclaimer of SNACKS FOR DOGS, for “pet food; edible pet treats; edible organic pet treats for dogs; edible vegan pet treats for dogs” in International Class 31.<sup>2</sup> After the Examining Attorney made the refusal final, Applicant filed three requests for reconsideration and appealed. The Examining Attorney denied the requests for reconsideration, the appeal then proceeded, and has been fully briefed. For the reasons set forth below, we affirm the refusal to register.

We note that Applicant attached exhibits to its Appeal Brief,<sup>3</sup> which is neither a convenience, nor a courtesy. *Life Zone Inc. v. Middleman Grp. Inc.*, 87 USPQ2d 1953, 1955 (TTAB 2008) (evidence attached to briefs will almost always be either untimely or duplicative, and in either event should not be filed); *see also* 37 C.F.R. § 2.142(b)(3) (“Citation to evidence in briefs should be to the documents in the electronic application record by date, the name of the paper under which the evidence was

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<sup>1</sup> Application Serial No. 88625423 was filed September 20, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on an alleged bona fide intent to use the mark in commerce. As originally filed, the drawing of the mark in the application was SUPERFOOD FOR SUPER DOGS, but in its January 27, 2020 Request for Reconsideration, Applicant amended the mark to eliminate the space between SUPER and DOGS. No corresponding amendment of the disclaimer was submitted.

<sup>2</sup> Registration No. 5724123 issued on April 9, 2019.

<sup>3</sup> 6 TTABVUE 13-163 (Applicant’s Brief, Exhibits). References to the briefs on appeal refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

submitted, and the page number in the electronic record”). The entire record from prosecution of the application is readily available to the Board.

## **II. Likelihood of Confusion**

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*\*3 (Fed. Cir. 2020) (“Not all *DuPont* factors are relevant in each case . . . .”). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

### **A. The Relatedness of the Goods**

In analyzing the relatedness of the goods under the second *DuPont* factor, we look to the identifications in the application and cited registration. *See Detroit Ath. Co.*, 128 USPQ2d at 1051; *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d

1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion as to a particular class if relatedness is established for any item of identified goods within that class in the application. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

The cited registration broadly identifies, *inter alia*, “pet food,” and we find that this encompasses Applicant’s “dog food, namely, dry kibbles for dogs only; none of the above including dog snacks, dog treats, pet snacks or pet treats.” Where, as here, the registrant’s identification of goods is broad, we presume that it encompasses all goods of the type identified. *In re Country Oven*, 2019 USPQ2d 443903, \*4 (TTAB 2019); *Southwestern Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015). “Pet food” is defined as “plant or animal material intended for consumption by pets. Typically sold in pet stores and supermarkets, it is usually specific to the type of animal, such as dog food or cat food.”<sup>4</sup> Thus, the registrant’s “pet food” embraces all types of “dog food,” including the specific type set forth in Applicant’s identification.

While Applicant’s identification explicitly excludes “dog snacks, dog treats, pet snacks or pet treats,” this does not avoid the overlap between the goods in the application and in the cited registration. As noted above, the identified goods in the cited registration are not limited to snacks or treats, but instead cover all “pet food.”

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<sup>4</sup> January 19, 2020 Office Action at 2 (Wikipedia.com). Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system.

The goods therefore are legally identical in part. The second *DuPont* factor weighs in favor of likely confusion.

### **B. The Trade Channels and Classes of Consumers**

Turning to the trade channels and classes of consumers, because the goods in the cited registration are in part legally identical to Applicant's, and there are no restrictions or limitations to the channels of trade in the respective identifications, we presume that the goods travel through at least some of the same channels of trade to the same classes of purchasers. *See Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, "the marketing channels of trade and targeted classes of consumers and donors are the same"); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). Thus, the third *DuPont* factor weighs in favor of likely confusion.

### **C. The Strength of the Cited Mark**

Before we turn to the similarity of the marks, we consider Applicant's contention that the cited mark is weak, as that will affect the scope of its protection. In determining the strength of a mark, we consider both its inherent conceptual strength based on the nature of the mark itself and its commercial strength, based on the marketplace recognition value of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace

strength (secondary meaning).”). The strength of a mark under the fifth *DuPont* factor rests on the extent to which “a significant portion of the relevant consuming public . . . recognizes the mark as a source indicator.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (citing *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005)). This factor involves assessing the mark “along a spectrum from very strong to very weak.” *Id.* (internal citations omitted). Third-party registrations for the relevant goods also may be considered powerful evidence of conceptual weakness of a term. Under the sixth *DuPont* factor, proof of recent consumer exposure to third-party use of similar marks in connection with similar goods may show commercial weakness of a mark, in that consumers generally distinguish among marks for the same goods consisting of or containing the term at issue (here, SUPERFOODS) based on minor distinctions. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

According to Applicant, “[t]he cited mark is a very weak mark and, while deserving of protection from the use of confusingly similar marks, it does not warrant the prohibition of common terms used to describe the goods.”<sup>5</sup> Applicant points to the disclaimer of SNACKS FOR DOGS in the cited registration, and then contends that the only additional word in the mark, SUPERFOOD, is “highly descriptive”<sup>6</sup> and has

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<sup>5</sup> 6 TTABVUE 7-8 (Applicant’s Brief).

<sup>6</sup> *Id.* at 4.

been weakened by widespread use in the industry. As a result, Applicant maintains that “[m]arks using the term ‘superfood’ for food therefore should not be entitled to broad protection against noncompetitive uses or against marks that differ in wording.”<sup>7</sup>

Both Applicant and the Examining Attorney introduced evidence that “superfood” refers to foods considered nutritionally dense and extremely healthy.<sup>8</sup> The Merriam-Webster Dictionary defines the term as “a food (such as salmon, broccoli, or blueberries) that is rich in compounds (such as antioxidants, fiber, or fatty acids) considered beneficial to a person’s health.”<sup>9</sup> Applicant also submitted ten third-party registrations that include the term SUPERFOOD(S) for food items (not referred to as pet food items),<sup>10</sup> a representative sample of which follows:

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<sup>7</sup> *Id.* at 7.

<sup>8</sup> *E.g.*, December 3, 2019 Office Action at 5; July 15, 2020 Request for Reconsideration at 70 (“Superfoods are foods that are naturally packed with nutrients and are widely beneficial to health and well-being”); *Id.* at 74 (“nutrient-packed and antioxidant-rich [foods] have been deemed “superfoods,” an elite, headline-grabbing category of ingredients that are thought to provide extra-special health benefits”).

<sup>9</sup> *Id.* at 12 (Merriam-Webster.com).

<sup>10</sup> As the Examining Attorney noted in his brief, three of the registrations relied on by Applicant have been cancelled (U.S. Registration Nos. 4438193, 4397997, and 4409683), and therefore we do not consider them. An expired or cancelled registration is evidence of nothing but the fact that it once issued. *Sunnen Prods. Co. v. Sunex Int’l Inc.*, 1 USPQ2d 1744, 1747 (TTAB 1987).



- **Superü Foods**, with **FOODS** and **PERUVIAN SUPERFOODS** disclaimed, for “dried fruits in powder form; dried vegetables in powder form” in International Class 29 and “cocoa” in International Class 30.<sup>11</sup>



- **HealthyJourney Superfood**, with **SUPERFOOD** disclaimed, for “supplements derived from superfoods, namely, food supplements, dietary and nutritional supplements, herbal supplements, fruit and vegetable powders for use as a dietary supplement” in International Class 5.<sup>12</sup>
- **BALANCE THE SUPERFOOD SHOT**, with **SUPERFOOD SHOT** disclaimed,<sup>13</sup> and **SUPERFOOD SHOT** on the Supplemental Register,<sup>14</sup> both registrations for “fruit and vegetable based drinks” in International Class 30, and with the same owner.

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<sup>11</sup> April 10, 2020 Request for Reconsideration at 23-24 (Reg. No. 6005686).

<sup>12</sup> *Id.* at 25-26 (Reg. No. 6008795).

<sup>13</sup> *Id.* at 27-28 (Reg. No. 5997921).

<sup>14</sup> *Id.* at 29 (Reg. No. 5998718).

- SUPERFOOD TORTILLAS on the Supplemental Register, with TORTILLAS disclaimed, for “tortillas” in International Class 30.<sup>15</sup>
- FORBIDDEN SUPERFOODS, with SUPERFOODS disclaimed, for “nut butters made from pecans, cashews and almonds; energy bites, namely, nut, seed and fruit-based snack bars” in International Class 29 and “granola; seed and nut breads” in International Class 30.<sup>16</sup>

The Examining Attorney criticized the third-party registration evidence as involving “different types of food for human consumption,” noting that “the submitted registrations appear to be for goods that are predominantly different from or unrelated to those identified in applicant’s application.”<sup>17</sup>

To address the Examining Attorney’s criticism of its third-party registration evidence, Applicant introduced evidence of third parties using the term “superfood” in connection with dog foods. Representative examples include:

- An article from the FoodDive website noting that “[p]opular dog food brands are introducing quinoa, ancient grains, blueberries, pumpkin and spinach – among other superfoods – as ingredients.”<sup>18</sup>
- An article from the PawLife website titled “13 Superfoods that are Safe for Dogs.”<sup>19</sup>

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<sup>15</sup> *Id.* at 31-32 (Reg. No. 5998696).

<sup>16</sup> *Id.* at 32-33 (Reg. No. 5981254).

<sup>17</sup> May 12, 2020 Denial of Reconsideration.

<sup>18</sup> July 15, 2020 Request for Reconsideration at 4.

<sup>19</sup> *Id.* at 19.

- An article from the Holistapet website titled “The 5 Best Superfoods For Your Dog’s Diet” that notes that ‘Superfood’ is a popular term often used in the food and health category.... They are specific foods that are publicly agreed to be highly beneficial towards nutritional health.”<sup>20</sup>
- An online article in DogsNaturallyMagazine on “Three Super Foods that Will Make Any Dog Healthier.”<sup>21</sup>
- The EntirelyPets website promotes “7 Superfoods to Add to Your Dog’s Diet,” noting that “Superfoods are dense with NUTRITION that benefits both humans and canines alike.”<sup>22</sup>
- The website of Earthborn Holistic promotes its dog food “with ancient grains & superfoods.”<sup>23</sup>

The Examining Attorney discounts the third-party evidence by alleging that “none of these websites use SUPERFOOD as a trademark or service mark for pet foods, and only one website uses SUPERFOOD to describe ingredients of the goods.”<sup>24</sup> He further contends that Applicant’s weakness argument as to SUPERFOOD in connection with pet food “is unpersuasive because it is not corroborated by virtually any evidence.”<sup>25</sup>

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<sup>20</sup> *Id.* at 36-47.

<sup>21</sup> *Id.* at 57-61.

<sup>22</sup> *Id.* at 49-56.

<sup>23</sup> *Id.* at 7.

<sup>24</sup> 8 TTABVUE 13 (Examining Attorney’s Brief).

<sup>25</sup> *Id.*

Considering the record as a whole, we find that the cited mark is somewhat weak, given that it consists of the disclaimed descriptive or generic wording SNACKS FOR DOGS preceded by the term SUPERFOOD, shown by the record to refer to extremely healthy and nutritious foods, in the context of both human and pet foods. *In re Guild Mortg. Co.*, 2020 USPQ2d 10279 \*3 (TTAB 2020) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance.’”). Based on the third-party use and registration evidence, SUPERFOOD has this understood significance with regard to food that may be eaten by pets as well as humans.

The probative value of the third-party registration evidence is moderated because the registrations do not identify pet food, and therefore differ from the goods identified in the cited registration. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (“third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered **for similar goods or services.**” (emphasis added) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976)). However, the Internet articles about introducing “superfood” into a pet’s diet show that the popularity of “superfood” in the human diet has carried over to the canine diet. The record as a whole suggests that consumers would understand SUPERFOOD in the registrant’s mark to refer to the nutritious and healthy nature of the pet food identified in the cited registration.

We agree with the Examining Attorney's characterization of the third-party use evidence as generally not showing that others in the pet food industry use SUPERFOOD in whole or part in the manner of a mark, and therefore does not support commercial weakness. Ultimately, the evidence shows the general meaning of SUPERFOOD, and includes descriptive references to SUPERFOOD in the context of feeding pets. The record reflects some degree of conceptual weakness of the term SUPERFOOD shared by the cited mark and Applicant's mark. *See Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) ("some segment that is common to both parties' marks may have 'a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak'") (quoting *Juice Generation*, 115 USPQ2d at 1674 (quoting 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015))).

#### **D. Similarity of the Marks**

We now compare the marks "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether

their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); see also *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Where the goods are legally identical, as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods. See *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Coach Servs.*, 101 USPQ2d at 1721); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)).

We compare Applicant's mark, SUPERFOOD FOR SUPERDOGS, to the cited mark, SUPERFOOD SNACKS FOR DOGS. We find the marks similar in appearance and sound because of their common structure and wording. Both marks begin with SUPERFOOD, include FOR in the middle, and end with DOGS. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (same word order and cadence in DETROIT ATHLETIC CO. and DETROIT ATHLETIC CLUB; "These similarities go a long way toward causing confusion among consumers."). While we have found that the shared term, SUPERFOOD, is somewhat conceptually weak, it has prominence as the first word in each mark, and given the nature and similarity of the remaining wording, Applicant's mark is overall too similar to the cited mark.

The differences between the marks come from Applicant's inclusion of SUPER as part of the compound word SUPERDOGS and the registrant's inclusion of the disclaimed generic word SNACKS. While these differences create some distinction in the way the marks look and sound, we find the marks overall more similar than dissimilar, particularly because we must consider the marks "in light of the fallibility of memory." *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)).

The marks also convey a very similar meaning and commercial impression – that the products consist of healthy, nutritious food for dogs. As to the significance of the variations in wording, first, the cited mark's inclusion of the disclaimed generic or descriptive word SNACKS, defined as "a light meal: food eaten between regular meals; also: food suitable for snacking,"<sup>26</sup> merely refers to food – the goods – and therefore does little to change the connotation or impression. The fact that the cited mark provides its "superfood" in the form of "snacks," a mere subcategory of that food, does not diminish the overall similar connotations of the marks. Second, Applicant's mark's use of SUPERDOGS, rather than DOGS by itself, merely adds a laudatory modifier, defined as "of high grade or quality,"<sup>27</sup> that contributes only minimally to the overall meaning and commercial impression of the marks.<sup>28</sup> In light of the overall

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<sup>26</sup> December 3, 2019 Office Action at 41 (Merriam-Webster.com).

<sup>27</sup> December 3, 2019 Office Action at 30 (Merriam-Webster.com).

<sup>28</sup> Applicant's submission of three third-party registrations of the marks SUPERDOGS for entertainment services, SUPERDAWG for fast food restaurants, and KRYPTO THE SUPERDOG for toys, April 10, 2020 Request for Reconsideration at 49-53, involve unrelated

structure and wording of the marks, we find them similar in meaning and commercial impression.

While we have considered the likelihood of confusion cases cited by Applicant as allegedly analogous, we do not find the nature of their comparison of the marks applicable here. We do not agree that the other cases offer helpful guidance in our analysis “because the critical facts of different cases almost always differ substantially,” *In re Gen. Mills IP Holdings II, LLC*, 124 USPQ2d 1016, 1027 (TTAB 2017), as they do here.

Given their overall resemblance in sound, appearance, connotation and commercial impression, we find SUPERFOOD FOR SUPERDOGS and SUPERFOOD SNACKS FOR DOGS similar.

### **III. Conclusion**

Regardless of some degree of conceptual weakness of the cited mark, the similarity of the marks for legally identical goods that are presumed to move in the same channels of trade to the same classes of customers remains sufficient to render confusion likely.

**Decision:** The refusal to register Applicant’s mark is affirmed.

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goods and services and do not persuade us that the use of SUPERDOGS in Applicant’s mark sufficiently distinguishes it from the registered mark.